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Dubon Bhd (in liquidation) v Wisma Cosway Management Corp

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-50–05 OF 2019(J)
AZAHAR MOHAMED CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), ROHANA YUSUF, ZAWAWI SALLEH AND NALLINI PATHMANATHAN FCJJ
21 MAY 2020

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Companies and Corporations — Winding up — Priorities — Whether management fees/service charges that wound-up company owed Management Corporation ('MC') in respect of strata unit it owned was a debt that had priority over other unsecured debts — Whether description of such a debt as a 'guaranteed' one under s 77 of the Strata Management Act 2013 did not mean MC had status of a secured creditor or that the debt owed to it was a secured one — Whether use of word 'guarantee' in s 77 only made such a debt an undisputed one for purposes of action for recovery by MC — Whether s 77 did not alter established insolvency regime under the Companies Acts — Whether debt that wound-up company owed MC was unsecured and ranked for settlement pari passu along with other unsecured creditors

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Following the court-ordered winding-up of the appellant ('Dubon'), its liquidator set about realising the company's assets to pay off creditors. One such asset was Dubon's beneficial ownership of a strata unit in Wisma Cosway. In order to sell the unit, the liquidator required the property to be transferred into Dubon's name but Wisma Cosway's developer refused to execute the transfer unless Dubon had settled its 'administrative and application fees' amounting to RM4,028 and another RM179,042.26 that Dubon owed the respondent as 'outgoings and service charges'. The liquidators refused to pay the aforesaid sums insisting that they were unsecured debts which could not be given preferential treatment over secured creditors in the winding-up process. In any case, the respondent had not lodged any proof of debt for the claimed sum. Through the liquidator, Dubon filed a claim with the Strata Management Tribunal ('the SMT') for an order directing the developer to execute the transfer of the strata unit to Dubon without imposing any charge and directing the respondent to issue a 'clearance letter' upon Dubon paying it RM43,805.34. The respondent counterclaimed for the full sum that it was owed and applied to the High Court under s 226(3) of the Companies Act 1965 ('the CA') for leave to commence/proceed with the said counterclaim. The High Court refused leave on the ground, inter alia, the respondent's claim was an unsecured debt that ranked *pari passu* with other unsecured debts of the

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company. The Court of Appeal ('COA') reversed the decision on appeal and held that: (a) leave ought to be granted to the respondent to proceed with its counterclaim; and (b) since Dubon's debt to the respondent was described as 'guaranteed' under s 77 of the Strata Management Act 2013 ('the SMA'), the respondent was a secured creditor and the use of the word 'shall' in s 77 mandatorily obliged Dubon to settle the respondent's debt before the unit could be sold to third parties. Dubon was granted leave by the Federal Court to appeal against the COA's decision on the question 'Whether the right of a Joint Management Body or a Management Corporation to collect and receive payment from a proprietor under ss 33 and 77 of the SMA, respectively, gives it a lawful preference as a secured creditor over the assets of a company in liquidation?' At the appeal hearing, Dubon submitted that the COA's decision went against established insolvency law because: (i) the mere use of the word 'guaranteed' with reference to a debt owed by a proprietor to a management corporation ('MC') in s 77 of the SMA could not elevate the status of the MC to a secured creditor or its debt to a preferential one over other unsecured creditors; and (ii) since the debt owing to the respondent was a simple, monetary claim which could easily be determined in the winding-up by way of lodgment of a proof of debt, it went against established practice to allow the respondent leave to sue for that debt in the SMT proceedings.

Held, unanimously allowing the appeal, setting aside the COA's decision, restoring the High Court's decision and answering the leave question in the negative:

(1) Section 77 of the SMA neither elevated the payment of management fees due to the respondent to the status of a secured debt, nor did it dislodge the statutory priority regime in s 292 of the Companies Act 1965 (which was the provision applicable in the instant case). Section 292 (now s 527 of the Companies Act 2016) provided that after payment of preferential debts, the liquidator was to safeguard the interests of the unsecured creditors by collecting and distributing the assets of the company *pari passu* amongst the unsecured creditors (see paras 25–27).

(2) At best, the word 'guarantee' in s 77 of the SMA denoted a statutory obligation between the management corporation ('MC') and a parcel owner, entitling the MC to recover maintenance and other related service charges from the parcel owner. This was reinforced by s 77(3) which referred to the sum owing by the parcel owner to the MC as a 'debt' which the MC could recover vide a suit filed in court or in the Strata Tribunal. That right to sue for the debt was a right in personam and not in rem (see paras 28–29).

(3) Nothing in s 77 of the SMA displaced, encroached upon or disrupted any part of the insolvency regime under the Companies Acts. Instead, it provided that the non-payment of management fees created an

undisputed debt. The word 'guarantee' in s 77 easily established the fact of the existence of such a debt and ensured that parcel owners did not evade their obligations to make such payments. Section 77 went no further than ensuring a fail-safe method of recovering management fees as an undisputed debt from parcel owners at the behest of the MC. Section 77 did not make the outstanding sum payable to the MC a secured debt. It had no effect on the rights of third-party creditors such as secured creditors or other unsecured creditors (see paras 30–31, 33–34 & 40).

(4) The High Court correctly applied the test that leave to commence proceedings (against a wound-up company) would be refused if the party applying for leave could obtain all relief in the winding-up. Leave would only be granted if the applicant's claim could not be adequately dealt with in the winding-up or if the remedy sought could not be granted in the winding-up proceedings. In the instant case, the recovery of the respondent's debt was easily procured in the winding-up proceedings by the filing of a proof of debt form. There was no necessity, therefore, for the COA to have granted the respondent leave to commence/proceed with its counterclaim in the SMT proceedings (see paras 41–42).

[Bahasa Malaysia summary

Berikutan penggulungan perayu ('Dubon') yang diperintahkan oleh mahkamah, pelikuidasi menetapkan untuk merealisasikan aset syarikat untuk melunaskan pemiutang. Salah satu aset tersebut adalah pemilikan benefisial Dubon untuk unit strata di Wisma Cosway. Untuk menjual unit tersebut, pelikuidasi perlu memindahkan harta itu ke atas nama Dubon tetapi pemaju Wisma Cosway enggan melaksanakan pemindahan tersebut melainkan jika Dubon telah menyelesaikan 'yuran pentadbiran dan permohonan' berjumlah RM4,028 dan RM179,042.26 yang Dubon berhutang kepada responden sebagai 'kos perbelanjaan dan perkhidmatan'. Pelikuidasi menolak untuk membayar jumlah tersebut dengan menegaskan bahawa ia adalah hutang tidak bercagar yang tidak dapat diberi layanan istimewa daripada pemiutang bercagar dalam proses penggulungan. Bagaimanapun, responden tidak mengemukakan bukti hutang untuk jumlah yang dituntut. Melalui pelikuidasi, Dubon mengemukakan tuntutan kepada Strata Management Tribunal ('SMT') untuk perintah yang mengarahkan pemaju untuk melaksanakan pemindahan unit strata ke Dubon tanpa mengenakan sebarang bayaran dan mengarahkan responden untuk mengeluarkan 'surat pelepasan' setelah Dubon membayarnya RM43,805.34. Responden membuat tuntutan balas untuk jumlah keseluruhan yang terhutang dan memohon kepada Mahkamah Tinggi di bawah s 226(3) Akta Syarikat 1965 ('AS') untuk mendapat kebenaran untuk memulakan/meneruskan tuntutan balas tersebut. Mahkamah Tinggi menolak kebenaran dengan alasan, antara lain, tuntutan responden adalah hutang tidak bercagar yang memberi peringkat *pari passu*

dengan hutang syarikat lain yang tidak bercagar. Mahkamah Rayuan ('MR') membatalkan keputusan rayuan dan memutuskan bahawa: (a) kebenaran harus diberikan kepada responden untuk meneruskan tuntutan balasnya; dan (b) oleh kerana hutang Dubon kepada responden digambarkan sebagai 'dijamin' di bawah s 77 Akta Pengurusan Strata 2013 ('APS'), responden adalah pemiutang bercagar dan penggunaan perkataan 'akan' pada s 77 secara mandatori mewajibkan Dubon untuk melangsaikan hutang responden sebelum unit tersebut dapat dijual kepada pihak ketiga. Dubon diberi kebenaran oleh Mahkamah Persekutuan untuk merayu terhadap keputusan MR mengenai pertanyaan 'Sama ada hak Badan Pengurusan Bersama atau Perbadanan Pengurusan untuk mengumpulkan dan menerima pembayaran dari pemilik di bawah ss 33 dan 77 APS, masing-masing, memberikannya keutamaan yang sah sebagai pemiutang bercagar terhadap aset syarikat dalam likuidasi?' Pada pendengaran rayuan, Dubon berhujah bahawa keputusan MR bertentangan dengan undang-undang insolvensi yang telah ditetapkan kerana: (i) penggunaan kata 'dijamin' semata-mata dengan merujuk kepada hutang yang terhutang oleh pemilik syarikat perbadanan ('MC') di s 77 APS tidak dapat menaikkan status SP kepada pemiutang bercagar atau hutangnya kepada yang utama berbanding pemiutang lain yang tidak bercagar; dan (ii) oleh kerana hutang yang terhutang kepada responden adalah tuntutan wang yang mudah, tuntutan wang dalam likuidasi dapat ditentukan dengan mudah dengan cara mengemukakan bukti hutang, ia bertentangan dengan amalan yang telah ditetapkan untuk membenarkan responden kebenaran untuk menuntut hutang tersebut dalam prosiding SMT.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan MR, mengembalikan keputusan Mahkamah Tinggi dan menjawab soalan kebenaran secara negatif:

(1) Seksyen 77 APS tidak membangkitkan pembayaran yuran pengurusan terhutang kepada responden kerana status hutang bercagar, juga tidak mengubah rejim keutamaan berkanun dalam s 292 Akta Syarikat 1965 (yang merupakan peruntukan yang berlaku dalam kes ini). Seksyen 292 (sekarang s 527 Akta Syarikat 2016) memperuntukkan bahawa setelah pembayaran hutang keutamaan, pelikuidasi harus melindungi kepentingan pemiutang tanpa cagaran dengan mengumpulkan dan mengagihkan aset syarikat *pari passu* di antara pemiutang yang tidak bercagar (lihat perenggan 25–27).

(2) Paling baik, perkataan 'jaminan' di s 77 APS menunjukkan kewajiban berkanun antara syarikat pengurusan ('MC') dan pemilik petak, yang memberi hak kepada SP untuk mendapatkan semula caj penyelenggaraan dan perkhidmatan berkaitan lain dari pemilik petak. Ini dikukuhkan oleh s 77(3) yang merujuk kepada jumlah yang harus dibayar oleh pemilik petak kepada SP sebagai 'hutang' yang boleh didapatkan kembali oleh SP melalui tuntutan saman yang difailkan di

mahkamah atau di Tribunal Strata. Hak untuk menyaman untuk hutang itu adalah hak in personam and bukan in rem (lihat perenggan 28–29).

(3) Tiada dalam s 77 APS yang membuang, menceroboh atau mengganggu mana-mana bahagian rejim insolvensi di bawah Akta Syarikat. Sebaliknya, ia menetapkan bahawa tidak membayar yuran pengurusan menimbulkan hutang yang tidak dipertikaikan. Perkataan 'jaminan' di s 77 dengan mudah membuktikan fakta adanya hutang tersebut dan memastikan bahawa pemilik petak tidak menghindari kewajiban mereka untuk melakukan pembayaran tersebut. Seksyen 77 tidak jauh daripada memastikan kaedah yang selamat untuk mendapatkan kembali kos pengurusan sebagai hutang yang tidak dipertikaikan dari pemilik petak atas perintah MC. Seksyen 77 tidak menjadikan jumlah tertunggak yang harus dibayar kepada SP sebagai hutang bercgar. Ia tidak mempengaruhi hak pemiutang pihak ketiga seperti pemiutang bercagar atau pemiutang tidak bercagar lain (lihat perenggan 30–31, 33–34 & 40).

(4) Mahkamah Tinggi dengan tepat menggunakan ujian bahawa kebenaran untuk memulai prosiding (terhadap syarikat yang digulung) akan ditolak jika pihak yang memohon kebenaran dapat memperoleh semua bantuan dalam penggulungan. Kebenaran hanya akan diberikan jika tuntutan pemohon tidak dapat ditangani dengan baik dalam proses penggulungan atau jika remedi yang dipohon tidak dapat diberikan dalam proses penggulungan. Dalam kes ini, pemulihan hutang responden mudah diperoleh dalam prosiding penggulungan dengan mengemukakan borang bukti hutang. Oleh itu, tidak ada keperluan bagi MR untuk memberikan kebenaran responden untuk memulakan/meneruskan tuntutan balasnya dalam prosiding SMT (lihat perenggan 41–42).]

Cases referred to

Cuthbert Lead Smelting Co Ltd, Re [1886] WN 84 (refd)
Ganda Setia Cemerlang Sdn Bhd & Anor v Maika Holdings Bhd (in liquidation) [2017] 6 MLJ 661; [2017] 1 LNS 1576, CA (refd)
Malaysian Trustees Bhd v Transmile Group Bhd & Ors [2012] 3 MLJ 679, CA (refd)
Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446; [1985] 1 LNS 47, SC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) ss 226(3), 292
Companies Act 2016 s 527
Strata Management Act 2013 s 77, 77(1), (3)

Appeal from: Civil Appeal No J-02(A)-768–04 of 2018 (Court of Appeal, Putrajaya)

Andrew Teh (Tan Chong Pei with him) (Wong Lu Peen & Tunku Alina) for the appellant.
Sivabalan (Goh Wan Ping with him) (Mastura Partnership) for the respondent.

Nallini Pathmanathan FCJ:

[1] In the field of insolvency, the law on the rights of secured and unsecured creditors, as well as that relating to priorities and preference payments, is well settled in statute, and consequently by case law, which provides both certainty and judicial precedent.

[2] This appeal was necessitated by reason of a failure to apply these well settled principles. This judgment serves primarily to restate certain fundamental principles of law in this area.

[3] The sole leave question allowed by this court on 9 May 2019, reads:

> Whether the right of a Joint Management Body or a Management Corporation to collect and receive payment from a proprietor under sections 33 and 77 of the Strata Management Act 2013 respectively, *gives it a lawful preference as a secured creditor over the assets of a company in liquidation*? (Emphasis added.)

[4] In essence the question before us relates to whether s 77 of the Strata Management Act 2013 ('the SMA') has the effect of elevating the status of a debt incurred under it, to that of a secured or preferential debt within the insolvency regime, where the proprietor of the parcel concerned is in liquidation, or is bankrupt.

[5] In other words, do payments received or recovered by a management corporation ('MC') as a debt, from the proprietors of properties held under the SMA who are in liquidation or bankrupt, enjoy priority or preference over other creditors, equivalent to that accorded to secured credit ors under an insolvency regime.

[6] This question requires a consideration of s 77 of the SMA, and how its provisions are to be construed in light of the insolvency regime as statutorily governed *at the material time* by s 292 of the Companies Act 1965 (now s 527 of the Companies Act 2016).

[7] Section 77 of the Strata Management Act 2013 ('the SMA 2013' or 'the Act') provides (in part):

> 77 Recovery of sum as a debt due to management corporation or subsidiary management corporation

(1) The payment of any amount lawfully incurred by the management corporation or the subsidiary management corporation in the course of the exercise of any of its powers or functions or carrying out of its duties or obligations *shall by virtue of this section be guaranteed* by the proprietors for the time being constituting the management corporation or the subsidiary management corporation.

(2) ...

(3) ...

(4) ... (Emphasis added.)

[8] The principal argument in the courts below was that the phrase 'shall by virtue of this section be guaranteed' in s 77(1) of the SMA 2013 supports the interpretation that the monies outstanding and due to the MC or the joint management body ('JMB') constitutes a debt which is accorded priority such that it enjoys the status of a secured debt within the insolvency regime.

[9] We heard this appeal on 5 November 2019, unanimously allowed it, and set aside the decision of the Court of Appeal. We answered the leave question in the negative, meaning that s 77 of the SMA *does not* accord any form of priority or preference in relation to payments received by a MC from an insolvent parcel proprietor.

[10] This judgment states the reasons for our decision.

SALIENT BACKGROUND FACTS

[11] We adopt the summary of facts in both parties' submissions with modification. The appellant, Dubon Bhd (in liquidation) ('the company')) is the *beneficial owner* of a lot known as Unit 22.05 ('the unit') in Wisma Cosway. The respondent, Wisma Cosway Management Corp, is the management corporation of Wisma Cosway ('MC').

[12] The company was wound up by an order of the Johor Bharu High Court dated 18 January 2000. As part of the process of realising the company's assets, which included the unit, the liquidators required the execution of the transfer of the unit into the company's name. This was necessary for the purposes of a sale of the subject property. (The liquidators were exercising their statutory duties to sell the property so as to bring in and pay off the debts of the company in liquidation.)

[13] The request was made of one Stephens Properties Sdn Bhd ('Stephens'), which had developed Wisma Cosway. Stephens however refused to execute the transfer unless the company first obtained a 'clearance' let ter from the MC in relation to an outstanding sum of RM183,070.26 ('outstanding sum'). The

outstanding sum comprised RM4,028 in 'administrative and application fees' owed to Stephens ('Stephens' sum') and RM179,042.26 payable as outgoings and service charges in respect of Unit 20.25 owed to the MC ('MC's sum').

[14] The company through its liquidator denied the claim. It took the position that it was not liable to pay the sums sought by Stephens and the MC because the company was in liquidation, and any payment of its liabilities was subject to the availability of funds for unsecured creditors. Moreover any such payment had to adhere to the order of priority of creditors who had proven their debts, as well as the *pari passu* rule. In this context the MC had not filed any proof of debt with the liquidator.

[15] Negotiations ensued to resolve the impasse as the liquidator had to realise the company's assets, but no resolution was reached.

[16] The company then, through its liquidator, filed a claim at the Strata Management Tribunal at Putrajaya ('ST proceedings'), seeking, inter alia, an order that:

(a) Stephens be directed to execute the memorandum of transfer without imposing any administrative and application fees; and

(b) the MC issue the clearance letter upon the company's payment of a sum of RM43,805.34.

[17] The MC filed a counterclaim for the sum it was owed and followed this up with an application in the winding up court for leave to commence or proceed with its counterclaim in the ST Proceedings under s 226(3) of the then Companies Act 1965.

The decision of the High Court in respect of the MC's application for leave to commence or proceed against the company under s 226(3) of the Companies Act 1965 (now repealed)

[18] The High Court refused the MC's application for leave to commence or proceed with any action against the company. In declining to do so, the High Court held in summary that the requirements for leave to proceed against the company in liquidation had not been met. This was because the only issue between the company and MC was whether the company was bound to pay the outgoings claimed by MC, ie whether that debt was due and payable. The High Court concluded that the MC's claim was bound to fail for two reasons:

(a) any claim made by MC before 31 May 2011 was time barred as at 31 May 2017 as no claim could be brought six years after the cause of action arose;

(b) more significantly for the purposes of this appeal, MC is an unsecured creditor and the remaining assets of the company had to be distributed *pari passu* amongst its unsecured creditors. Any payment of the sums demanded by MC would amount to an undue preference in favour of MC which contravenes the statutory insolvency regime as prescribed at the material time under s 292 of the Companies Act 1965 (and now s 527 of the Companies Act 2016);

(c) MC had not filed a proof of debt in relation to its claim and therefore sought to circumvent the prescribed winding up process for creditors. The counterclaim sought to be brought was purely monetary in nature and MC ought to have filed a proof of debt to enable the liquidator to deal with it in the course of the winding up process; and

(d) in totality, MC's claim was monetary and did not involve complex issues of fact or law. It could be sufficiently dealt with in the course of the winding up process in the winding up court and did not require separate adjudication albeit in the tribunal or any other court.

The decision of the Court of Appeal

[19] Dissatisfied, the company appealed to the Court of Appeal, which reversed the decision of the High Court and decided that this was a proper case to grant leave under s 226(3) of the Companies Act 1965.

[20] The Court of Appeal, in allowing MC's appeal and granting leave to proceed against the company in liquid ation for the purposes of recovery of the sums of money stated to be due and owing to it, decided, inter alia, that:

(a) s 77 of the SMA provides that the amount due to the MC is a 'guaranteed sum' and therefore a valid point of law arose which required ventilation. This point of law was whether MC would remain an unsecured creditor who was entitled together with other unsecured creditors to the remaining assets of the company on a *pari passu* basis, or be elevated to the status of a secured creditor of the compa ny by virtue of the fact that the monies owed by the company to it was a 'guaranteed sum' under s 77 of the SMA;

(b) while the test relating to the grant of leave to commence or proceed against a company in liquidation is not in dispute, the MC was entitled u nder the SMA to recover the guaranteed sum in the tribunal as a debt due and owing to it; and

(c) as s 77 utilised the word 'shall' it imposed a mandatory obligation on the proprietor, here the company, to pay any outstanding amount due to the MC before the property was disposed of to third parties.

[21] The reasoning of the Court of Appeal in determining that this was a fit case for the grant of leave for MC to bring a claim against the company in a separate court, apart from the winding up court, runs awry of the settled and trite principles of insolvency law. This is so in two respects, namely:

(a) the law relating to the grant of leave to proceed against a company in liquidation in an adjudicatory forum other than the winding up court. The test is whether the claim can be adequately determined in the winding up court without incurring the time and expense of initiating or proceeding with new proceedings in a separate court. The claim here relates to a straighforward and simply computed debt. The primary issue in determining the quantum relates to limitation. No complex issues of law arise in relation to the debt per se. Accordingly, the grant of leave to proceed against the company in the tribunal in respect of a simple monetary claim, contravenes settled principles for the grant of leave; and

(b) more significantly, the preliminary view expressed by the Court of Appeal to the effect that by virtue of s 77 of the SMA, which uses the phrase 'guaranteed sum', the claim of the management corporation ie MC, is no longer an unsecured debt but is accorded priority and elevated to a status/position equivalent to that of a secured creditor. Such a preliminary view was expressed without consideration of the statutory insolvency regime in the Companies' Act or the *pari passu* principle in relation to the class of unsecured creditors.

The competing submissions before this court

[22] The foregoing summary captures the essence of the argument the company put forward before us. It was submitted that the Court of Appeal departed from settled principles of law relating to secured and unsecured debts by advocating the position that s 77 of the SMA created a new category of secured creditor outside of the statutory insolvency regime in the Companies Act 2016. The fact of the matter is that the outstanding sum is an unsecured debt and accordingly ought to be dealt with by the winding up court by way of the lodgement of a proof of debt form.

[23] The respondent essentially supported the reasoning and judgment of the Court of Appeal, namely that on a proper construction of s 77 of the SMA 2013, *the outstanding sum is a secured debt*. It was further submitted that the issue could not adequately be resolved before the winding up court.

Our decision

Does s 77 of the Strata Management Act 2013 create a preferred or priority statu sequivalent to a secured debt within the insolvency regime? A

[24] The Companies Act 1965 (then) and the Companies Act 2016 now in force provide a comprehensive regime relating to the law of insolvency upon a company being wound up. These statutes contain similar statutory provisions in relation to the priority of payments due to secured and unsecured debtors in liquidation. Those provisions are s 292 under the 1965 Act and s 527 under the present Companies Act 2016. B

Section 292 Priorities. C

(1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts —

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281; D

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hun dred ringgit or such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up; E F

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up; G

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and H I

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

A (2) The debts in each class specified in subsection (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall ab ate in equal proportions between themselves.

B ...

[25] Section 292, which was applicable at the material time, provides that *after* the payment of preferential debts, the liquidator acts to safeguard the interests of the unsecured creditors. That in turn is ensured by the collection C and distribution of the assets of the company *pari passu* amongst unsecured creditors (see *Mosbert Berhad (in liquidation) v Stella D' Cruz* [1985] 2 MLJ 446; [1985] 1 LNS 47 (FC)).

D **[26]** Any interpretation which seeks to dislodge these statutory provisions and settled principles of insolvency law cannot be supported. In essence the questions before us were:

(a) whether s 77 of the SMA dislodges or ousts the priority regime as set out in s 292 of the Companies Act 1965? and

E (b) whether the SMA elevates the payment of the arrears of management fees to the status of a secured debt by reason of the term 'guaranteed' in the said section?

F **[27]** The simple answer to these two questions is that s 77 has no such effect. It neither dislodges the statutory priority regime in the Companies Act nor elevates the payment of management fees to the status of a secured debt.

[28] We concur with counsel for the company that at best the word G 'guarantee' in s 77 of the SMA denotes a statutory obligation between the MC and a parcel proprietor, entitling the MC to recover maintenance and other related service charges from a parcel proprietor.

[29] This is reinforced by sub-s (3) of s 77 which refers to the sum due from H a parcel proprietor to the MC as a 'debt' which is actionable by the MC vide a suit filed in court or in the strata tribunal. That right to sue for a debt is a right in personam and not a right in rem. The MC therefore enjoys a right in personam to recover the debt from the parcel proprietor. It goes no further than that.

I **[30]** There is nothing in the language of s 77 which even makes reference to or purports to oust such insolvency principles. That is because s 77 was never crafted nor intended to encroach upon, or disrupt the priority regime in the Companies Act. Any provision which seeks to achieve priority can only be done

by way of statutory provision and that too, vide positive, clear and unambiguous words. It is evident from a perusal of s 77 that Parliament never intended to displace any part of the statutory insolvency regime.

[31] It served instead to statutorily provide that the non payment of management fees creates an undisputed debt. The term 'guaranteed' ensures the fact of the existence of such a debt. It ensures that parcel proprietors do not evade their obligations to make such payments. The recovery of such debts is thus assured and can simply be effected under the section.

[32] As such, a reading of s 77 which purports to accord such a debt priority on a parity akin to a secured debt is to miscomprehend and misconstrue both the effect of the section and the statutory insolvency regime in this jurisdiction.

[33] Ultimately therefore s 77 was never intended to, and does not go further than ensuring a fail safe method of recovering management fees as an undisputed debt from parcel proprietors at the behest of the MC.

[34] It follows that when s 77 is construed in the context of the entirety of the SMA, and in light of the general regime of insolvency law as set out in the Companies Act, the outstanding sum payable to the MC is not a secured debt. It is a guaranteed debt vis a vis the company and the MC, which is a different matter alto gether. It has no effect on the rights of third party creditors, such as secured creditors or other unsecured creditors.

[35] Our rationale is borne out by s 292 as well as the importance of the *pari passu* rule in insolvency in relation to unsecured creditors. The MC is such an unsecured creditor. In *Malaysian Trustees Bhd v Transmile Group Bhd & Ors* [2012] 3 MLJ 679 the sanctity of the rule in insolvency law was expressed as follows:

> [22] The pari passu rule is the cornerstone of insolvency law. It is one of the most fundamental principles of the law of liquidation and is at the very heart of the whole statutory scheme of winding up. It is considered as the most universal of all insolvency principles. It is an old equitable principle that all persons similarly situated are entitled to equality in treatment in the distribution of the assets of the company in the process of liquidation (see *McPherson's Law of Company Liquidation* at para 13.100 at pp 13–1051 and *Roy Good Principles of Corporate Insolvency Law* at p 175 para 7.02) ...

[36] In *Transmile* the Court of Appeal went on to explain that s 292(1) provides for the distribution of assets in winding up. *The liquidator is obliged firstly to apply the available unencumbered assets to settle the preferential debts as statutorily provided for and secondly to pay the unsecured debts of the company pari passu.* As such 'debts of the same class shall rank equally between themselves

A and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves'.

B **[37]** To reiterate the leave question reads as follows:

> Whether the right of a Joint Management Body or a Management Corporation to collect and receive payment from a proprietor under sections 33 and 77 of the Strata Management Act 2013 respectively, *gives it a lawful preference as a secured creditor over the assets of a company in liquidation*? (Emphasis added.)

C **[38]** For the reasons we have enumerated above, we had no hesitation in answering the sole leave question in the negative.

Leave to commence or proceed with proceedings for recovery of the arrears of
D management fees

[39] That brings us to the secondary issue of whether leave ought to have been granted to the MC to enable it to proceed with the recovery of the debt owed to it by the company, or whether it would suffice for the recovery to be
E effected by way of the filing of a proof of debt form in the winding up court.

[40] It is apparent from our analysis above that the use of the word 'guaranteed' in the SMA ensures and assures straightforward recovery of the debt claimed by the MC. The fact of the existence of a debt is easily established
F and payment due 'guaranteed'. What may well remain in issue is limitation. That issue is a matter of law and may be resolved without difficulty. It is certainly not a complex issue that requires adjudication in a court of law. We failed to see any exceptional issue in this case that precluded the respondent
G from filing a proof of debt in the winding up court.

[41] As such the High Court judge was correct in applying the test he did, premised on the well-known principles cited, inter alia, in *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 and more recently by the Court
H of Appeal in *Ganda Setia Cemerlang Sdn Bhd & Anor v Maika Holdings Bhd (in liquidation)* [2017] 6 MLJ 661; [2017] 1 LNS 1576. The test is that set out in the old English decision of *Re Cuthbert Lead Smelting Co Ltd* [1886] WN 84 which held that if the party applying for leave could obtain all the relief in the winding up, leave would be refused. If that party's claim cannot however be
I adequately dealt with in the winding up or if the remedy sought cannot be granted in the winding up proceedings then leave would be granted.

[42] For the reasons set out above, it is evident in the instant case that recovery of the debt is easily procured in the winding up proceedings by the filing of a proof of debt form. There is therefore no necessity for the grant of a leave.

CONCLUSION

[43] The reasons we have set out in full in this judgment comprise the basis for the decision we made at the hearing of the appeal. To reiterate, we allowed the appeal, set aside the decision of the Court of Appeal, and restored the order of the High Court. We answered the leave question in the negative.

Appeal unanimously allowed; COA's decision set aside; High Court's decision restored; and leave question answered in the negative.

Reported by Ashok Kumar